Introduction to the 2015 Chapman Law Review Symposium:

Trolls or Toll-Takers: Do Intellectual Property Non-Practicing Entities Add Value to Society?

by Samuel F. Ernst¹

There are few areas of patent law more contentious than the dispute over the social utility of “non-practicing entities,” or (if you will excuse the expression) “patent trolls.”² Generally speaking, patent trolls are companies that acquire patents, not for the purpose of developing new technologies and creating jobs, but for the sole purpose of demanding royalties (through litigation if necessary) from those companies that do release products on the market. Whether non-practicing entities add value to society is a topic of much debate, and the focus of this conference.

On the one hand, there has been no shortage of condemnation of patent trolls from the legal community. One study reported that patent trolls imposed direct litigation costs on defendants of $29 billion in 2011 alone.³ This stunning figure does not even include the indirect costs of litigation (for example, the cost of manpower directed away from useful activities when engineers must assist in collecting discovery, giving depositions, investigating non-infringement and invalidity defenses, and so forth; and the jobs that

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could be preserved or created with the money spent on defending litigation). Nor does this figure include the substantial amount of royalties paid to patent trolls in licensing negotiations to avoid the prospect of costly litigation.\(^4\) Robin Feldman and her colleagues estimate that patent trolls filed 58.7% of the patent infringement lawsuits in 2012, and observe that trolls frequently target start-up companies in the internet and technology sectors;\(^5\) companies that are just embarking on the path to innovation and cannot afford to defend themselves even if the asserted patents are plainly invalid or not infringed.

In this vein, commentators condemn patent trolls as “bottom feeders” who acquire and assert low value patents, calculating that the high cost of litigation will result in an early settlement.\(^6\) Patent trolls are able to drive up the cost of litigation with impunity. They can demand expensive discovery but are immune to counterattacks because they produce no products that can be the target of patent infringement counterclaims and have little information to discover, given that they are small companies or even shell corporations with little or no employees.

\(^4\) See id. at 409.
\(^6\) See Mark A. Lemley and Douglas Melamed, Missing the Forest for the Trolls, 113 COLUM. L. REV. 2117, 2126 (2013). Professor Lemley and Mr. Melamed identify two other varieties of patent trolls: “lottery ticket” trolls own a patent they believe reads on a wide swath of technology and hope to “hit it big” with a large jury award; “patent aggregators” collect many thousands of patents and are able to force companies to take licenses without litigation because it is infeasible and prohibitively expensive to defend against such a sheer number of patents, regardless of whether they are valid or infringed. Id. at 2126-27.
Indeed, whereas most areas of patent law are arcane and abstract, patent trolls have failed to escape the attention even of the President of the United States, who has complained that patent trolls “don’t actually practice anything themselves. They’re just trying to essentially leverage and hijack somebody else’s idea and see if they can extort some money out of them.” And condemnation of patent trolls appears to be one area on which the two parties can agree. Vox reports that “[t]he incoming Republican chairmen of both the House and Senate Judiciary committees have signaled their support for patent legislation. And they largely see eye to eye with President Obama, who has also called for reform.” In support of such reforms, Senator Orrin Hatch recently said, “[p]atent trolls – which are often shell companies that do not make or sell anything – are crippling innovation and growth across all sectors of our economy.”

On the other hand, some scholars have argued that the criticism of patent trolls is misguided. James F. McDonough forcefully argues that patent trolls (or patent dealers, as Professor McDonough calls them) benefit society by providing liquidity, market clearing, and increased efficiency to the market for patents. The evolution of an efficient market for innovation gives inventors an incentive to invent and gives the public “easier and broader access to inventions.” Hence patent trolls help to effectuate the

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9 Id.
10 McDonough, supra n. 2 at 216-218.
11 Id. at 223.
goal of the Patent and Copyright Clause of the U.S. Constitution, to “promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries.”

In a wholly different vein, Mark Lemley and A. Douglas Melamed argue that those who focus their energy on attacking patent trolls are “missing the forest for the trolls.” While patent trolls are a large and growing problem, they are merely “a symptom of systemic issues the patent system faces in the IT industry – too many patents interpreted too broadly, a remedy system that routinely awards excessive damages and enables patent holders to bargain for excessively costly settlement, and an enormous royalty stacking problem.” Professor Lemley and Mr. Melamed further argue that “[p]racticing entities, as well as trolls, can and do take advantage of these issues.”

The 2015 Chapman Law Review Symposium will seek to advance the discussion of non-practicing entities in three ways: (1) by expanding on the scholarly debate surrounding patent trolls summarized above; (2) by expanding on the perspectives informing this debate beyond academia by inviting the views of practitioners from both sides of the patent troll divide; and (3) by expanding on the scope of this topic by considering the nature and possibility of copyright and trademark trolls.

First, a panel of distinguished patent law scholars will expand upon and further develop the debate summarized above with new data and theories on the issue of patent trolls:

12 U.C. Const. art. I., § 8, cl. 8.
13 Lemley and Melamed, supra n. 6 at 2180.
14 Id.
• Professor Robin Feldman will explore the nature of patent trolls and assess their impact on the business and legal landscape of the country. Professor Feldman will then consider how the legal system has responded to the patent troll phenomenon through legislation, court decisions, and regulatory activity and consider what reforms may lay ahead.

• Professor Amy L. Landers will explore how patent trolls are creating a “bubble” in the value of patents, the bursting of which could have destabilizing, negative consequences for investment in research and development.

• Professor Ryan T. Holte will analyze in detail the Supreme Court case of eBay v. MercExchange, in which the Supreme Court struck a blow to patent trolls by holding that a finding of patent infringement does not necessarily entitle a plaintiff to a permanent injunction. Professor Holte argues that the opinion is misunderstood as precluding non-practicing entities from obtaining injunctions, due, inter alia, to eBay’s superior publicity resources and because the parties settled before the Federal Circuit had a chance to rule on the case after remand to the district court.

• Professor Brian Frye will argue that the use of the patent troll metaphor and other intellectual property metaphors obscures our understanding of the societal justification for intellectual property and causes us to grant intellectual property rights that are incompatible with that justification. If we set the patent troll metaphor aside, we find that non-practicing entities theoretically provide market liquidity to ensure that inventors obtain the
full market value of their patents. To the extent non-practicing entities
cause mischief by asserting weak patents or increasing litigation costs, this
is true of practicing entities as well and is the fault of the Patent and
Trademark Office issuing low quality patents.

Second, a distinguished panel of patent law practitioners and policy makers will
debate the effect of non-practicing entities on industry. This panel will include:

- Congressman Dana Rohrabacher of California’s 48th Congressional
  District;
- Robert D. Fish, a partner at Fish & Tsang LLP who litigates patent cases;
- Lee Cheng, the Chief Legal Officer of the technology company Newegg
  Inc.;
- Ian D. McClure, the Director of Intellectual Property Exchange
  International, Inc., a company that describes itself as “the World’s First
  Financial Exchange for Licensing and Trading Intellectual Property
  Rights”,\(^\text{15}\) and
- Nathan Shafroth, a partner at Covington & Burling LLP who litigates
  patent cases.
- John B. Sganga, Jr., a partner at Knobbe, Martens, Olson & Bear, LLP
  who litigates patent cases and teaches at the Fowler School of Law will
  moderate this panel.

Third, a distinguished panel of copyright and trademark scholars and practitioners
will expand this discussion to consider the nature and existence of “soft i.p.” trolls:

\(^{15}\) https://www.ipxi.com.
• Professor Tom W. Bell will examine the emergence of “copyright pornography trolls,” who sue thousands of John Doe defendants with the hopes of netting millions in settlement payments from the guilty and innocent alike. Professor Bell will also examine the use of taxi medallions to pursue networked transportation companies such as Uber and Lyft. Professor Bell argues that these types of vexatious conflicts result from the mistreatment of statutory and regulatory privileges as property rights.

• Professor Michael S. Mireles will explore how trademark law has effectively mitigated the problem of non-practicing entities through farsighted laws and regulations in areas such as Internet domain registration and Patent and Trademark Office inter partes proceedings.

Chris Arledge, the co-founder and managing partner of One LLP, Brad Greenberg of the Columbia Law School, and Lindy Herman of Fish and Tsang LLP will also contribute to this panel. The panel will be moderated by Professor Mary Lee Ryan of the Fowler School of Law.

Finally, we are honored to have Andrew Byrnes, Chief of Staff of the United States Trademark Office as our keynote speaker. Mr. Byrnes will discuss ongoing developments relevant to patent applicants and owners, including non-practicing entities, and the role of the U.S. Patent and Trademark Office and the Obama Administration in helping to ensure that the IP system is balanced, effective, and promotes innovation.